

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.

Investigation 02-06-003  
(Filed June 6, 2002)

**JOINT RULING OF ASSIGNED COMMISSIONER  
AND ADMINISTRATIVE LAW JUDGE  
DENYING NOVEMBER 18, 2003 PETITION  
TO SET ASIDE SUBMISSION AND REOPEN THE RECORD**

**Petition to Set Aside Submission and Reopen the Record**

**Background**

On November 18, 2003, more than four months after the final submission of this proceeding and more than two months after issuance of the Presiding Officer's Decision (POD), Cingular Wireless (Cingular) filed a petition to set aside submission and reopen the record to take further evidence. The Commission's Consumer Protection and Safety Division (CPSD) and Utility Consumers' Action Network (UCAN) filed a joint opposition on December 3, 2003. With the leave of the assigned administrative law judge (ALJ), Telephia,

Inc. (Telephia) filed an opposition on December 5, 2003. Cingular filed a reply on December 15, 2003.

Cingular seeks leave to “introduce unredacted versions of drive tests from 2001 and 2002 which provide the results of independent drive tests performed by Telephia for Cingular and each of its competitors in each major market throughout California.” (Petition, pp. 7-8.) Cingular represents that “[t]he drive test results contains [sic] the number and percentages of dropped and blocked calls for each carrier, along with other measures, as well as weighted scores which reveal how well or poorly each carrier’s network performed in each area.[footnote omitted]” (*Id.*, p.8.)

These drive tests are necessary now, Cingular contends, to support assertions in its appeal of the POD, which CPSD purports to rebut in a response to that appeal. Focusing on the POD’s finding that during 2001, Cingular’s lack of disclosure of known network problems, coupled with aggressive advertising and marketing, violated Pub. Util. Code §§ 451 and 2896, Cingular argues:

Though Cingular argued for the admission of evidence to show how it performed as compared to other carriers during the time in question, Telephia, a vendor who collects and sells such information to wireless carriers, opposed the introduction of such evidence . . . . Had the evidentiary record included comparative information about other carriers, the POD would have undoubtedly reached a different result regarding Cingular’s performance.” (Petition, p. 6 [quoting Cingular Appeal of POD].)

Cingular then cites a portion of CPSD’s response:

CPSD does object to the cryptic suggestions, sprinkled throughout Cingular’s Appeal, that it is in possession of data—apparently from Telephia or other sources [reference omitted]—that would show that its network performance was not so bad. Had Telephia’s information been so exculpatory, Cingular should have helped CPSD to obtain Telephia’s

information via subpoena, and effort that was largely thwarted by Telephia's motion to protect its data from discovery . . . . (Petition, p.6 [quoting CPSP's Response to Cingular's Appeal of POD.]

### **Discussion**

Cingular's petition fails for multiple reasons.

First, Cingular's petition does not substantially comply with Rule 84 of the Commission's Rules of Practice and Procedure (Rules), which governs petitions to set aside submission. Rule 84 provides:

After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties, and file with the Commission, a petition to set aside submission and reopen the proceeding for the taking of additional evidence, or for consideration of a settlement or stipulation under Article 13.5. Such petition shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

We need not address whether a POD is a "decision" for the purposes of the rule. Cingular has not shown that material changes of fact or law have occurred since hearings were adjourned. We could deny the petition on that basis alone.

However, mindful of Rule 87's requirement that the Commission's rules be "liberally construed to secure just, speedy, and inexpensive determination of the issues presented," it is appropriate to consider whether the Commission should deviate from Rule 84 here. We conclude it should not.

Most critically, the POD simply does not make its findings nor base its penalties upon Cingular's performance relative to its competitors. The Commission issued this Order Instituting Investigation (OII) to examine

Cingular's operations, practices, and conduct based on probable cause that Cingular's activities were not in compliance with law. The activities of other wireless carriers, whether lawful or unlawful, are not determinative of this OII.

Moreover, if Cingular believed that evidence of industry practice (or merely the practices of one or more of its competitors) was exculpatory of its own conduct, Cingular could have provided such evidence in a timely fashion. The representation, quoted above, that "Cingular argued for the admission of evidence to show how it performed as compared to other carriers during the time in question" suggests a stronger position than the one memorialized in the relevant law and motion transcript.<sup>1</sup> Cingular did not seek to compel production of such evidence from Telephia or others during discovery and it never sought the introduction or admission of such evidence, from any source, at hearing. Both CPSD and Cingular presented expert witnesses who espoused familiarity with wireless operations, generally, and with the operations of Cingular and others, specifically. Cingular's petition, now, is untimely and should be denied.

### **Concurrent Motion to Reconsider Law & Motion Rulings from 2002**

Concurrently with its petition, Cingular filed a motion to reconsider a law and motion ruling by ALJ Sarah Thomas, which resolved a CPSD motion to compel production of documents. The written ruling by ALJ Thomas on

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<sup>1</sup> CPSD sought to compel discovery of certain Telephia drive test information by data request after the OII issued. Cingular contended that a contractual nondisclosure agreement prevented it from providing such discovery. Telephia, an unregulated entity, made a special appearance to oppose the motion to compel, claiming trade secret interests in the information, among other things. Review of the transcript for the September 5, 2002 law and motion hearing, ALJ Thomas presiding, reveals that the ALJ rejected the trade secret characterization of the data but agreed that since the OII put only Cingular at issue, Telephia might redact information about other carriers. Cingular did not protest this ruling at that time or during hearing.

October 21, 2002, also memorialized her prior, oral ruling on September 5, 2002. Because we deny the related Petition to set aside submission and reopen the record, this motion is moot.

**IT IS RULED** that:

1. The November 18, 2003, Petition to Set Aside Submission and Reopen the Record, filed by Cingular Wireless (Cingular) is denied.
2. The November 18, 2003, Motion to Reconsider ALJ's Ruling on Motion to Compel, filed by Cingular, is moot.

Dated January 15, 2004, at San Francisco, California.

/s/ CARL WOOD  
Carl Wood  
Assigned Commissioner

/s/ JEAN VIETH  
Jean Vieth  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Joint Ruling of Assigned Commissioner and Administrative Law Judge Denying November 18, 2003 Petition to Set Aside Submission and Reopen the Record on all parties of record in this proceeding or their attorneys of record.

Dated January 15, 2004, at San Francisco, California.

/s/ KE HUANG

Ke Huang

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.